

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

TRASH TAXI, INC.,
a Michigan corporation,

Plaintiff,

vs.

Case No. 2004-0793-CK

ANTHONY JOSEPH and
STERLING SANITATION,
a Michigan corporation;
Jointly and Severally,

Defendants,

and

STERLING SANITATION,
a Michigan corporation,

Defendant and
Counter-Plaintiff,

vs.

TRASH TAXI, INC.,
a Michigan corporation,

Plaintiff and
Counter-Defendant,

and

ANTHONY JOSEPH,

Defendant and
Counter-Plaintiff,

vs.

TRASH TAXI, INC.,
a Michigan corporation,



2004-000793-
CK
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Plaintiff and
Counter-Defendant,

and

ANTHONY JOSEPH,

Defendant and
Third-Party Plaintiff,

vs.

C&R MAINTENANCE, INC. d/b/a
RIZZO SERVICES,
RIZZO SERVICES, INC. and
CURTIS E. AGIUS,

Third-Party Defendants,

and

STERLING SANITATION,
a Michigan corporation,

Defendant and
Third-Party Plaintiff,

vs.

C&R MAINTENANCE, INC. d/b/a
RIZZO SERVICES, and
RIZZO SERVICES, INC.,

Third-Party Defendants.

OPINION AND ORDER

Defendant Anthony Paul Joseph seeks resolution of his motion for partial summary disposition against third-party defendant Curtis E. Agius under MCR 2.116(C)(10).

I. BACKGROUND

Plaintiffs Trash Taxi, Inc. and Traci M. Agius filed this action on February 25, 2004 asserting plaintiff Traci Agius has always been plaintiff Trash Taxi's majority shareholder. Plaintiff Trash Taxi and defendant Joseph signed an agreement in which plaintiff Trash Taxi agreed to sell defendant Joseph twenty percent of its shares. Part of the agreement was a covenant not to compete and stock purchase rights. Defendant Joseph became vice president of and was employed by plaintiff Trash Taxi until resigning on August 4, 2003.

Plaintiffs Trash Taxi and Traci Agius aver defendant Joseph, acting in concert with defendant Sterling Sanitation, solicited several clients from plaintiff Trash Taxi's customer list immediately before and continuing after his termination of employment. Consequently, several of plaintiff Trash Taxi's clients changed their waste removal services to defendant Sterling Sanitation, causing plaintiffs Trash Taxi and Traci Agius to suffer damages.

Accordingly, plaintiff Trash Taxi and Traci Agius' complaint alleges: I. Breach of Contract against defendant Joseph; II. Breach of Covenant Not to Compete against defendant Joseph; III. Violation of the Michigan Uniform Trade Secrets Act, MCL 445.1901 *et seq.*, against defendants Joseph and Sterling Sanitation; IV. Tortious Interference with Contractual Relationship against defendants Joseph and Sterling Sanitation; V. Tortious Interference with Advantageous Business Relationships, Expectancies and/or Prospective Economic Relations against defendants Joseph and Sterling Sanitation; VI. Unfair Competition against defendants Joseph and Sterling Sanitation; VII. Breach of Fiduciary Duty against defendant Joseph; VIII. Breach of Shareholder's Expectations and/or Reverse Oppression of Majority Shareholder against defendant Joseph; IX. Specific Performance under MCL 450.1489 and the Stock Purchase and Restriction Agreement against defendant Joseph; X. Conversion against defendants Joseph and Sterling Sanitation; XI. Usurping Business Assets and Opportunities against

defendants Joseph and Sterling Sanitation; XII. Fraud against defendant Joseph; XIII. Silent Fraud against defendant Joseph; XIV. Innocent/Negligent Misrepresentation against defendant Joseph; XV. Civil Conspiracy against defendants Joseph and Sterling Sanitation; XVI. Unjust Enrichment against defendants Joseph and Sterling Sanitation; XVII. Promissory Estoppel against defendant Joseph and XVIII. Preliminary and Permanent Injunction against defendants Joseph and Sterling Sanitation.

On April 9, 2004, defendant Sterling Sanitation filed a counterclaim asserting it entered a written contract with plaintiff Trash Taxi in which plaintiff Trash Taxi rented a roll-off truck. Defendant Sterling Sanitation avers plaintiff Trash Taxi has refused to pay for the rental of the vehicle and returned it damaged.

Accordingly, defendant Sterling Sanitation's counterclaim alleges: I. Breach of Contract; II. Account Stated and III. Quantum Meruit.

On April 29, 2004, defendant Joseph filed a counterclaim and third-party complaint asserting third-party defendant Curtis E. Agius is plaintiff Trash Taxi's president. Defendant Joseph avers he entered an employment agreement with plaintiff Trash Taxi to serve as its vice president of sales on July 30, 2002. In addition, he purchased a 20% interest in plaintiff Trash Taxi and loaned it an additional \$150,000 under a Promissory Note that was personally guaranteed by third-party defendant Curtis Agius.

Defendant Joseph claims plaintiff Trash Taxi failed to pay his salary, maintain his benefits and reimburse his business expenses. Third-party defendant Curtis Agius also began to negotiate the potential sale of plaintiff Trash Taxi. Waste Management was interested in purchasing plaintiff Trash Taxi in a deal worth \$2,200,000 (including the payoff of all debts) that would have paid defendant Curtis Agius \$357,000. However, when third-party defendant Curtis

Agius was less than forthcoming in his due diligence dealings with Waste Management, Waste Management backed out of the sale.

Defendant Joseph maintains plaintiff Trash Taxi entered a consulting agreement with CJR Consulting, Inc. whose sole shareholder is Charles Rizzo, Jr., the president of third-party defendants C&R Maintenance, Inc. and Rizzo Services, Inc. (collectively, "Rizzo"). Under the consulting agreement, CJR Consulting became president and CEO of plaintiff Trash Taxi and was to be paid \$15,000 per week or receive a like assignment of any of plaintiff Trash Taxi's assets of its choosing. Plaintiff Trash Taxi was subsequently unable to pay the consulting fee and assigned the right to service certain disposal accounts to CJR Consulting; CJR Consulting assigned these accounts to third-party defendants Rizzo on March 20, 2004. Defendant Joseph's debt remains unpaid.

Defendant Joseph contends third-party defendant Curtis Agius unsuccessfully negotiated sales of plaintiff Trash Taxi to Onyx and Ron Runco. Defendant Joseph states he was approached by third-party defendant Curtis Agius to purchase plaintiff Trash Taxi on a Wednesday for \$20,000 if defendant Joseph could pay by that Friday. Defendant Joseph was prepared to make the purchase on that Saturday, one day later. When he planned to consummate the deal on that Saturday, he learned plaintiff Traci Agius and third-party defendant Curtis Agius had instead sold plaintiff Trash Taxi to third-party defendants Rizzo. Prior to the sale, third-party defendants Rizzo had been awarded a contract for residential waste removal in Hamtramck and needed a means—plaintiff Trash Taxi—of fulfilling its obligations.

Defendant Joseph argues he resigned his employment with plaintiff Trash Taxi on August 3, 2003. He demanded repayment of the loan and that plaintiff Trash Taxi purchase his stock. However, plaintiff Trash Taxi and third-party defendant Curtis Agius refused to repay the loan or

purchase defendant Joseph's stock. Moreover, despite his 20% ownership interest, defendant Joseph did not realize any compensation from the sale of plaintiff Trash Taxi to third-party defendants Rizzo.

Accordingly, defendant Joseph's twice amended counterclaim and third-party complaint allege: I. Breach of Contract (Promissory Note) against third-party defendant Curtis Agius; II. Breach of Employment Contract against plaintiff Trash Taxi; III. Minority Shareholder Oppression against plaintiffs Trash Taxi and Traci Agius; IV. Breach of Fiduciary Duty against third-party defendant Curtis Agius and plaintiff Traci Agius; V. Civil Conspiracy against third-party defendant Curtis Agius, plaintiff Traci Agius and third-party defendants Rizzo; VI. Breach of Contract (Stock Purchase Agreement) against plaintiff Trash Taxi and third-party defendants Rizzo; VII. Successor Liability against third-party defendants Rizzo; VIII. Accounting against plaintiff Trash Taxi; IX. Appointment of a Receiver against plaintiff Trash Taxi; X. Tortious Interference with Advantageous Business Relationship or Expectancy against third-party defendants Rizzo, third-party defendant Curtis Agius and plaintiff Traci Agius; XI. Constructive Fraud against third-party defendant Curtis Agius and plaintiff Traci Agius; XII. Unjust Enrichment against third-party defendants Rizzo; XIII. Conversion against third-party defendants Rizzo and XIV. Breach of Asset Purchase Agreement against defendants Rizzo.¹

On October 25, 2004, defendant Sterling Sanitation filed a third-party complaint asserting plaintiff Trash Taxi and third-party defendants Rizzo operate a roll-off disposal service, the same service that defendant Sterling Sanitation provides. Third-party defendants Rizzo purchased plaintiff Trash Taxi to service plaintiff Trash Taxi's accounts. As part of the purchase, third-party defendants Rizzo agreed to assume and become obligated for plaintiff Trash Taxi's debt,

¹Count XIV purported to be a class action claim on behalf of similarly situated creditors owed money by third-party defendants Rizzo because of their purchase of plaintiff Trash Taxi and succession to its debt.

including that owed to defendant Sterling Sanitation. Third-party defendants Rizzo has failed to pay over \$16,600 owed to defendant Sterling Sanitation.

Defendant Sterling Sanitation also avers plaintiff Trash Taxi entered a consulting agreement with CJR Consulting whose sole shareholder is Charles Rizzo, the president of third-party defendants Rizzo. Under the consulting agreement, CJR Consulting became president and CEO of plaintiff Trash Taxi and was to be paid \$15,000 per week or receive a like assignment of any of plaintiff Trash Taxi's assets of its choosing. Plaintiff Trash Taxi was subsequently unable to pay the consulting fee and assigned the right to service certain disposal accounts to CJR Consulting; CJR Consulting assigned these accounts to third-party defendants Rizzo on March 20, 2004. Defendant Sterling Sanitation maintains its debt remains unpaid.

Accordingly, defendant Sterling Sanitation's third-party complaint alleges: I. Conspiracy; II. Successor Liability and III. Breach of Asset Purchase Agreement against third-party defendants Rizzo.

Defendant Joseph subsequently moved for summary disposition against third-party defendants Rizzo and Curtis Agius. An *Opinion and Order* dated August 10, 2005 denied defendant Joseph's motion for summary disposition against third-party defendants Rizzo but held a decision against third-party defendant Curtis Agius in abeyance pending evidence that abatement did not apply. Defendant Joseph proffered evidence that an Oakland County Circuit Court action (*Joseph v Trash Taxi, Inc*, Case No. 2003-052711-CK, Hon. John J. McDonald) was dismissed against third-party defendant Curtis Agius without prejudice.

On October 3, 2005, third-party defendants Rizzo moved for summary disposition of Counts X and XIV of defendant Joseph's amended third-party complaint. An *Opinion and Order* dated February 6, 2006 granted the motion with respect to Count XIV, only, dismissing that

claim.

A *Stipulated Order of Dismissal* entered March 1, 2006 dismissed plaintiff Traci Agius' complaint against defendants Joseph and Sterling Sanitation, and dismissed defendants Joseph and Sterling Sanitation's counter-complaints against plaintiff Traci Agius, with prejudice.²

The parties now seek resolution of defendant Joseph's motion for partial summary disposition against third-party defendant Curtis Agius that had been held in abeyance.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The reviewing court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in the light most favorable to the nonmoving party. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The nonmoving party must proffer evidence establishing a material issue of disputed fact exists for trial to avoid summary disposition. *Id.*

III. ANALYSIS

As a preliminary matter, the guaranty is part of the Promissory Note and must be construed in conjunction therewith rather than piecemeal. See, e.g., *Pickering v Pickering*, 268 Mich App 1, 13; 706 NW2d 835 (2005) (agreement must be read as a whole), and *Brauer v Hobbs*, 151 Mich App 769, 774; 391 NW2d 482 (1986) (construction and interpretation of contract require knowledge of entire contract). Significantly, third-party defendant Curtis Agius does not argue the Promissory Note is unenforceable. Hence, his signature at the end of the Promissory Note by the word "guaranteed" created an enforceable guaranty on the same terms as the Promissory Note. *Damerau v CL Rieckhoff Co, Inc*, 155 Mich App 307; 399 NW2d 502

²The case caption has been correspondingly amended.

(1986).

Indeed, defendant Curtis Agius testified that he understood he was personally guaranteeing the Promissory Note when he signed it after the word "guaranteed". He stated he knew that he would be personally responsible for the Promissory Note if plaintiff Trash Taxi did not repay defendant Joseph's loan.

Consequently, defendant Curtis Agius' argument that the guaranty is not enforceable or violates the statute of frauds wholly lacks merit.

Third-party defendant Curtis Agius also testified the loan has not been paid back. However, defendant Joseph testified plaintiff Trash Taxi had paid him some money back on the Promissory Note. While defendant Joseph could not identify how many payments had been made or the amount thereof, his lack of knowledge does not establish the absence of any evidence in this regard (e.g., bank and/or corporate records).

Finally, defendant Curtis Agius has not proffered any evidence in support of his affirmative defenses to enforcement of his Promissory Note guaranty. Contrast *Village of Dimondale, supra*; see also MCR 2.116(G)(3)(b), (G)(4) and (H).

IV. CONCLUSION

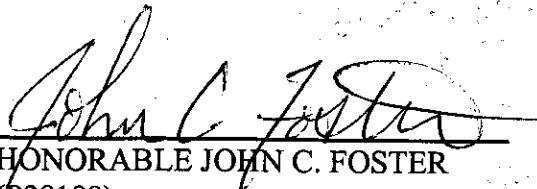
For the reasons set forth above, defendant Anthony Joseph's motion for partial summary disposition against third-party defendant Curtis E. Agius is:

A. GRANTED, in part, with respect to third-party defendant Curtis Agius' liability, only, on his guaranty of the Promissory Note and

B. DENIED in all other aspects under MCR 2.116(C)(10).

This Opinion and Order neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.


HONORABLE JOHN C. FOSTER
(P28189)

JCF/sw

DATED: May 16, 2006

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